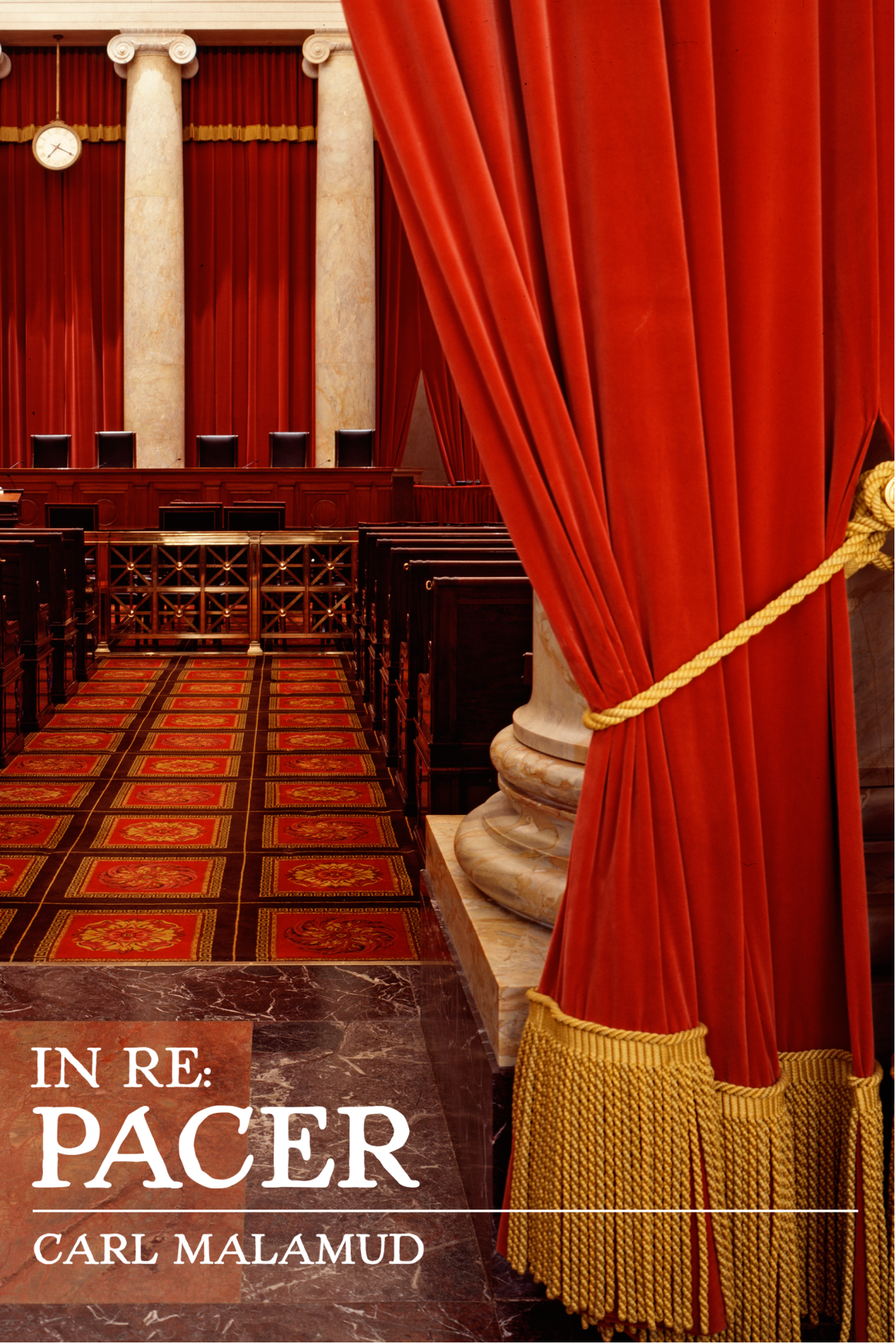

IN RE: PACER

CARL MALAMUD

IN THE UNITED STATES COURT
OF APPEALS FOR PUBLIC OPINION

In re: The PACER System

Carl Malamud, Public.Resource.Org

MEMORANDUM *of* LAW

A National Strategy of
Litigation, Supplication, and Agitation

RED, WHITE, *&* BLUE TEAMS:
Metaphors Working for a Better America

MAY 1 – *"Law Day"* –
Proposed as a National Day of PACER Protest

MEMORANDUM OF LAW

A National Strategy of Litigation, Supplication, and Agitation

https://Yo.YourHonor.Org/

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Aaron Swartz Memorial PACER Cup to be Awarded
The Great Law Day PACER RACE

Oyez! ★ Oyez! ★ Oyez!

All Persons Having Business Before
The Honorable Courts Of The United States
Are Admonished To Draw Near And
Bring Their Credit Card!

MEMORANDUM OF LAW

1 This memorandum proposes a strategy of litigation, supplication, and agitation to solve our national PACER problem in 2015. PACER is the system run by the federal judiciary that provides access to court dockets. While I am not a lawyer, I attempt in this memorandum to explain some of the legal issues (from my unlicensed perspective), and then venture some thoughts as to how lawyers, activists, and other citizens can all work together to bring these issues to the attention of decision-makers.

2 Public Access to Electronic Court Records (PACER) is the computer system that publishes U.S. Appellate, District, and Bankruptcy court records and documents. The system is run by the Administrative Office of the U.S. Courts, which reported in 2012 that the system had 1.4 million users with access to over 500 million case file documents and that 95% of users surveyed are "satisfied" or "very satisfied" overall. *Source: Administrative Office of the U.S. Courts,* Electronic Public Access Program Summary*, December 2012.*

3 To use the PACER system, a person must furnish their name, address, date of birth, a valid credit card, and a valid U.S. tax-payer ID. The charging algorithm is complex, but is essentially $0.10/page with a maximum of $3 per document. Additional charges are levied for docket reports in HTML, audio files, and searches of the PACER Case Locator. If a user incurs less than $15 in charges per quarter, the fee for that quarter is waived. *Source: Administrative Office of the U.S. Courts,* PACER User Manual for ECF Courts*, September 2014.*

4 The reason a tax ID is required in addition to a credit card is because "in the event that federal debt collection is necessary,

the tax ID may be used in that effort." I've experienced this firsthand as a friend of mine racked up large PACER bills and was hounded by two debt collection agencies, despite the fact that the bills appeared to be very much in error. *Source: Administrative Office of the U.S. Courts,* Frequently Asked Questions*, undated document with* 2,563 HTML errors*, last accessed January 2, 2015.*

5 The Administrative Office is very proud of PACER, part of a $500 million per year information technology program. They have recently rolled out the so-called NEXTGEN upgrade to PACER, which features improvements such as longer user names. *Source: Administrative Office of the U.S. Courts,* Fiscal Year 2014 Update, Long Range Plan for Information Technology in the Federal Judiciary*, September 2013.*

6 PACER was the subject of the annual report of the Chief Justice for 2014. The Chief Justice discussed the pneumatic tubes that were used in the Supreme Court for 36 years as introduction to a discussion of why the courts must proceed cautiously on matters of technology. He defended PACER as "no modest feat," a system with "more than one billion retrievable documents" that are accessible by "paying a modest user fee—in many cases, no fee." The Chief Justice then explained that the Supreme Court would not be using PACER and would develop their own filing system and that once the system is implemented in 2016, "all filings at the Court—petitions and responses to petitions, merit briefs, and all other types of motions and applications—will be available to the legal community and the public without cost on the Court's website." *Source: Chief Justice Roberts,* 2014 Year-End Report on the Federal Judiciary, *December 31, 2014.*

SUPREME COURT BUILDING

7 It is worth noting that Cass Gilbert, who designed the Supreme Court building and those magnificent pneumatic tubes, also put Robert Aitken's sculpture of "Liberty Enthroned Guarded by Order and Authority" on the pediment, but their Authority crumbled and the building is being repaired. Cass Gilbert also installed a magnificent door at the top of the steps as the

symbolic entrance to the halls of justice, but those doors are rarely used due to security considerations. *Sources: The Cass Gilbert Society,* United States Supreme Court | *Library of Congress,* Pneumatic Tubes*, Prints and Photographs Collection.*

CASS GILBERT

§ It is possible that the Chief Justice was responding to significant criticism of the PACER system he received earlier in the year when the Administrative Office declared they would be deleting old docket sheets from the systems of five courts. *Sources:* Letter from Members of the House of Representatives*, September 9, 2018* | Letter from Senator Patrick Leahy*, September 12, 2014* | Letter from Members of the Senate*, September 18, 2014.*

9 Public assessments of PACER have been significantly less positive than those from the Chief Justice or the Administrative Office. The user interface clearly shows its roots in early bulletin board systems, searching is less than rudimentary, and there are numerous other technical deficiencies. *Sources: Jeff John Roberts,* Why the federal court record system PACER is so broken, and how to fix it*, Gigaom, August 27, 2014 | Brian Browdie,* Why Pacer should (and should not) be like Edgar*, Quartz, November 24, 2014.*

10 My own engagement with the PACER system began with the publication of an FAQ that proposed, *inter alia,* the creation of a Thumb Drive Corps to "recycle" PACER documents by using a pilot project that had been started in 16 law libraries by the Administrative Office to "discover if a segment of the public desires access to information contained in the PACER system." *Source: Public.Resource.Org,* 16 Frequently Asked Questions About Recycling Your PACER Documents*, October 2008.*

11 I had considered our PACER Recycling Program as a symbolic move, a rhetorical vehicle for the FAQ. But, two of my colleagues took it to heart. Steve Schultze wrote a rudimentary crawler to use the free access service in the libraries, and Aaron Swartz applied that crawler to recover 2,706,431 documents totalling 19,856,160 pages (753.9 GB). *Source: Timothy B. Lee,* The inside story of Aaron Swartz's campaign to liberate court filings*, Ars Technica, February 8, 2013.*

12 Evidently, the PACER People didn't monitor their logs, because they didn't notice the download for a couple of months. Then, they totally freaked, cutting off access to all 16 libraries in the

pilot project and calling the FBI. The FBI didn't find anything wrong because nothing wrong had occurred, but it certainly put a chill in the air. *Source, Aaron Swartz,* Wanted by the FBI, *October 5, 2009.*

13 As I had previously found a large number of Social Security Numbers in appellate decisions, I suspected the problem would be far worse at the District Court level, so I began an intensive audit, culminating in formal notices sent to 32 Chief Judges, an acknowledgement of thanks from several judges and from the Judicial Conference of the United States, and changes in the privacy policies of the courts. *Sources:* Letter from the Honorable Royce C. Lamberth to Public.Resource.Org, *January 28, 2009* | Letter from the Judicial Conference of the United States to Senator Joseph I. Lieberman, *March 26, 2009* | *Public.Resource.Org,* Audit of 32 District Courts, *October 24, 2008.*

14 The controversy became public when it was written up in the New York Times. Even though the FBI had told the Administrative Office that we had done nothing wrong, the Administrative Office called the FBI *again* after the embarrassing article came out to see if they could find something on Aaron or me. Again, we had done nothing wrong and the FBI reported as much back to the bureaucrats. *Sources: John Schwartz,* An Effort to Upgrade a Court Archive System to Free and Easy, *New York Times, February 12, 2009* | *Aaron Swartz,* Transcription of Call from FBI Agent, *April 14, 2009.*

15 The 19.8 million pages that were retrieved and scrubbed for privacy violations became the "seed corn" for an innovative

system called RECAP ("Turning PACER Around") put together by Steve Schultze and his colleagues at Princeton under the direction of Professor Ed Felten. The system was based on a Firefox extension and the use of the Internet Archive as a repository for recycled PACER documents. If the file that a user

DOCUMENT ROOM

wants to access is already on the Internet Archive, the user gets it for free. If the file is not present in the collection, the user pays for the document and a copy is uploaded to the Internet Archive. The RECAP project now has some files for 1,104,952 different court cases. *Source: Center for Information Technology Policy (Princeton) and the Free Law Foundation,* About RECAP The Law*, last accessed January 10, 2014 | Internet Archive,* RECAP US Federal Court Documents*.*

16 There are three mechanisms whereby a user can obtain PACER documents without charge. The first is the waiver of charges if fees total less than $15/quarter. The Administrative Office claim that 75% of PACER users fall within the fee waiver category, but I am skeptical of these claims and wonder if the PACER People are perhaps counting inactive accounts. The second mechanism is that attorneys get one free download of every document on cases in which they participate. *Source: Administrative Office of the U.S. Courts,* Electronic Public Access Fee Schedule*, December 1, 2013.*

PNEUMATIC TUBES

17 The third mechanism is to apply to a judge for a fee exemption. Fee exemptions are not available to government agencies, members of the media, or attorneys and "requires those seeking an exemption to demonstrate that an exemption is limited in scope

and is necessary in order to avoid an unreasonable burden." A condition of the fee exemption is that users "agree not to sell the data they receive through an exemption (unless expressly authorized by the court)" and that policy has been interpreted by the PACER People as also prohibiting the use of the RECAP plugin, even though that data is not being sold. The Judicial Conference Policy Notes on the PACER fee exemption concludes by stating that the policy "cautions that exemptions should be granted as the exception, not the rule, and prohibits courts from exempting all users from EPA fees." *Sources: PACER Service Center,* Notice for Fee Exempt PACER Users*, undated notice* / *Judicial Conference of the United States,* Report of the Proceedings of the Judicial Conference of the United States*, September 23, 2003, page 14.*

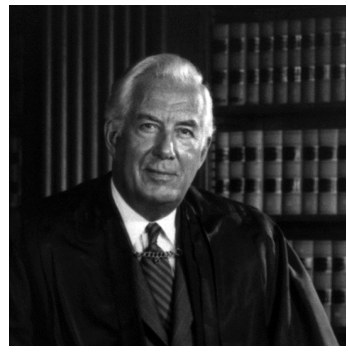
18 The last significant public comment period on the PACER system was in 2007, regarding privacy policies for electronic case files. What is disturbing is that the PACER People—the IT staff at the Administrative Office and their overseers on the Judicial Conference Committee on Information Technology—refuse to discuss PACER with outsiders such as myself. Indeed, when one of my colleagues was slated to appear on a panel at a conference with an Administrative Office representative, the Administrative Office refused to appear if my colleague's invitation was not rescinded. *Sources: Judicial Conference of the United States,* Fall 2007 Request for Comment*, 2007.*

19 There is a disconnect between the almost universal condemnation of PACER from the outside world and the rousing defense mounted by the Administrative Office and most recently the Chief Justice. Some of the best analysis of the problems with

PACER come from Steve Schultze and Harlan Yu, two of the RECAP developers. *Sources: Steve Schultze,* Making Excuses for Fees on Electronic Public Records*, February 7, 2013 | Harlan Yu,* Assessing PACER's Access Barriers*, August 17, 2010.*

20 The question I've been pondering for the last few years is how one might change this situation. In this memorandum, I will present three strategies that if pursued concurrently might bring to the notice of those in authority the extent of public frustration with this system. The strategies are litigation, supplication, and agitation. Before looking at those strategies, it is important to understand if there is a "right" to access PACER in a more meaningful fashion.

21 There is a long-standing common law right to access the courts. When Richard Nixon tried to prevent tapes that had been played in the court room from being released, Chief Justice Burger started his opinion with a discussion of how it is "clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." He was equally clear, however, that "the right to inspect and copy judicial records is not absolute." *Source: Nixon v. Warner Communications,* 435 U.S. 589*, 98 S.Ct. 1306, 55 L.Ed.2d 570, April 18, 1978.*



CHIEF BURGER

22 Because PACER is a system for the federal courts, there are constitutional implications to restricting access to the courts. The courts are defined in Article III, and those powers must function within the framework and limitations, in particular the rights to freedom of speech and to petition the government (First Amendment), the right to a public trial (Sixth Amendment), and the general rights of due process (Fifth Amendment and Fourteenth Amendment) and equal protection (as applied to the Fifth Amendment in the Bolling case). *Source: Bolling v. Sharpe,* 347 US 497*, 74 S.Ct. 693, 98 L.Ed. 884, May 17, 1954.*

23 The courts function under an express grant of authority from the Congress, so there are also statutory provisions governing access to the courts, in particular the E-Government Act of 2002, which states that "[t]he judicial conference may, only to the extent necessary, prescribe reasonable fees … for collection by the courts … for access to information available through automatic data processing equipment." The intent of Congress was made clear in the Senate Report on the bill, which stated "the Committee intends to encourage the Judicial Conference to move from a fee structure in which electronic docketing systems are supported primarily by user fees to a fee structure in which this information is freely available to the greatest extent possible." *Sources: E-Government Act of 2002,* Public Law 107-347*, 116 Stat. 2899, December 17, 2002 | U.S. Senate, S. Rept. 107-174,* E-GOVERNMENT ACT OF 2001*, Committee on Governmental Affairs, June 24, 2002.*

24 By constrast, the provision to charge for PACER is an appropriations measure, in which Congress charged the Judicial Conference to "prescribe reasonable fees." That act was very

specific that "these fees may distinguish between classes of persons, and shall provide for exempting persons or classes of persons from the fees in order to avoid unreasonable burdens and to promote public access to such information." In other words, the courts could easily have set up a system of free public access with charges only to commercial users or attorneys or other classes. *Source: Judiciary Appropriations Act of 1992,* Public Law 102-140*, 105 Stat. 782, October 28, 1991.*

25 Although I authored this memorandum in response to the report from the Chief Justice, I have been thinking about PACER and what we can do about it since the Administrative Office raised the stakes by calling the FBI on us in 2008 and then again in 2009. That thinking intensified greatly after Aaron's arrest for the JSTOR incident, which occurred at the time I began my campaign to make edicts of government more broadly available. Aaron's death further strengthened my determination that we should continue efforts to finish the work we started to make PACER more broadly available so that our system of democracy will function more effectively. *Sources: Carl Malamud,* An Edicts of Government Amendment*, Testimony Before the House Judiciary Committee, January 14, 2014 | Carl Malamud,* On Crime and Access to Knowledge*, March 30, 2013.*

26 There are three strategies outlined in this memorandum. Strategy one is litigation, suing the courts because the current system violates the rights of those suing. I call this the Red Team approach. Even if this approach is not successful, if one or more credible law suits are mounted, this will force the Administrative Office to defend their current policies, and will bring the issue to the attention of the judiciary in a way they will not be

able to ignore. It will also increase pressure on the judiciary and the congress to consider non-litigation solutions to these problems. I know of at least two active efforts investigating potential litigation on PACER.

27 The most difficult issues are standing—the ability to bring a suit in federal court—and the form of the claim. One cannot, for example, sue the Administrative Office of the Court for violations of the E-Government Act because private individuals have no standing to sue under that statute. For example, when a *pro se* petitioner tried to allege that the actions of an IRS revenue agent violated the E-Government Act, the court ruled "this act does not provide for any private cause of action." *Source: Zajac v. United States, Docket 2:12-cv-00230, M.D. Fla.,* Opinion and Order*, June 17, 2014.*

WINTER AT THE COURT

28 The most straightforward claim is that the structure or operation of PACER somehow violates the U.S. Constitution. That is clearly a federal question, and it is a broad one. Broad claims are of course much more difficult to prosecute successfully than narrow ones. *Source: U.S. Code,* 28 U.S.C. § 1331 *(Federal Question).*

29 Alternatively (or in parallel), one could seek a Declaratory Judgment, an action that is brought when there is an actual controversy, but not necessarily any harm or damages. For example, when the Sheet Metal and Air Conditioning Contractors (SMACNA) threatened me for posting a standard that was explicitly incorporated into the Code of Federal Regulations, my lawyers at EFF and Fenwick & West went to District Court to seek a Declaratory Judgment. We were able to prevail in a settlement, including a perpetual right to continue posting standards from SMACNA that are incorporated by reference. *Sources: U.S. Code,* 28 U.S.C. § 2201 *(Declaratory Judgment Act) | Public.Resource.org v. Sheet Metal and Air Conditioning Contractors' National Association, Inc., Case 3:13-cv-00815,* Stipulation and Judgment, *July 9, 2013.*

30 Another possible form of action is to seek a writ of mandamus, a common law action that directs a government official (such as the Administrative Office) to perform a task that they are supposed to have done. For example, if a clerk refuses to allow you to register to vote and you are entitled to vote, you might seek a writ of mandamus. *Sources: U.S. Code,* 28 U.S.C. § 1651 *(All Writs Act) | U.S. Code,* 28 U.S.C. §1361 *(Action to compel an officer of the United States to perform his duty).*

31 While it is tempting to focus on the question of fees when it comes to litigation, it is important to remember that the Constitution does not guarantee one a free lunch. Costs can of course lead to the denial of constitutional rights, as in the case of a poll tax, but the mere presence of a fee is not dispositive. *Source: Bruce Ackerman and Jennifer Nou,* Canonizing the Civil Rights Revolution: The People and the Poll Tax*, Northwester Law Review, Vol 103, 2009.*

NO FREE LUNCH

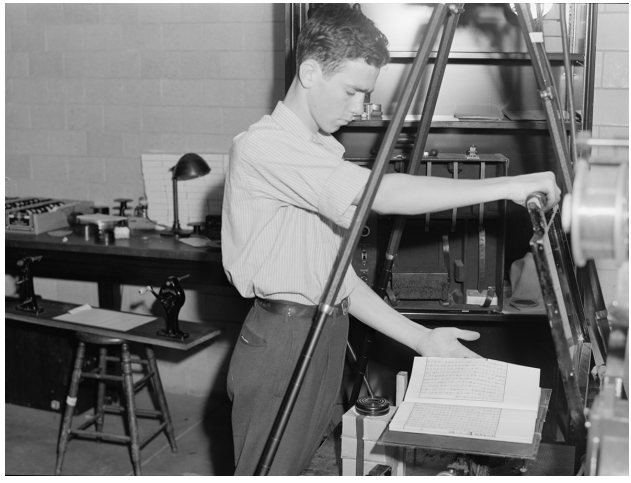
32 One strategy is to focus not on cost but on the structure of PACER that prohibits a number of beneficial uses. For example, users cannot search the National Case Locator for case information by judge, by attorney name, nature of suit, or cause of action, although some districts support the latter. For users who are not parties to a suit, there are no options to receive auto-

mated alerts of case activity in district courts. And even though almost all documents on PACER are text-searchable, there is no way to conduct a keyword search (even in a single district). But perhaps the biggest complaint about PACER is the inability to access bulk data in a systematic fashion or to know what has been updated in the full district (as opposed to in a single case). *Source: Administrative Office of the U.S. Courts,* PACER Case Locator *(Login required, charges will apply).*

33 One of the most compelling arguments I've seen about PACER is that the current structure precludes valuable work that could be done by journalists, researchers, and other interested citizens wishing to inform themselves and others about the operations of our courts and how those operations could be improved. The inability to work over large number of cases precludes important empirical work, such as that done by researchers like Matthew Sag, Professor of Law at Loyola University Chicago School of Law, and his pioneering studies of copyright litigation in federal courts. Likewise, academic centers focusing on a particular area of the law, such as the Civil Rights Litigation Clearinghouse at the University of Michigan Law School, is made exceedingly difficult by the structure of the PACER system. *Source: Matthew Sag,* Copyright Trolling, An Empirical Study, Iowa Law Review *(Forthcoming) | University of Michigan Law School,* Civil Rights Litigation Clearinghouse.

34 There have been attempts in the past to utilize the PACER Fee Exemption process to obtain free PACER access. However, it is important to understand that the grant of a fee exemption is not a matter that one can easily litigate, it is a matter of administrative discretion of the court. This was made clear when a request

for a fee waiver was denied in district court and the matter was appealed. The court dismissed the appeal for lack of jurisdiction. *Sources: In Re: Application for Exemption From Electronic Public Access Fees by Jennifer Gollan and Shane Shifflett,* Opinion by Circuit Judge O'Scannlain*, No. 12-16373, 9th Circuit, August 29, 2013 | Administrative Office of the U.S. Courts,* Amicus Brief*, January 22, 2013.*



DOCUMENT ADMINISTRIVIA

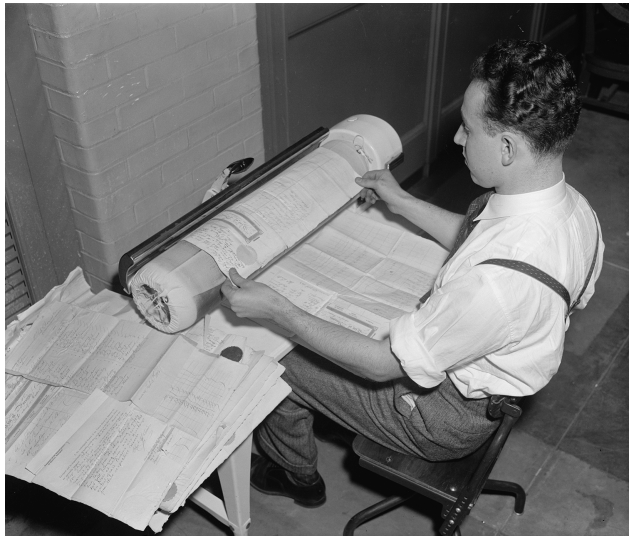
35 While a PACER Fee Exemption is a ministerial, administrative task, there is an interaction between substance and clerical actions, such as the case of a refusal to process a voter registration application. A good example of this interaction is in matters of litigation, where Congress has given the courts the right to adopt rules of procedure, provided however that "such rules shall not abridge, enlarge or modify any substantive right." *Source: U.S. Code,* 28 U.S.C. § 2072 *(Rules of procedure and evidence; power to prescribe).*

36 The interaction between procedure and substance was the subject of the Shady Grove case, where federal civil procedure allowed a class action suit, but a New York state statute would have prohibited it. This is a tricky analysis, and has been the subject of a number of interesting papers. What is important for our purposes is that even though PACER fee exemptions are administrative tasks, as with rules of procedure, there can be substantive implications. *Sources: Shady Grove v. Allstate Insurance, 130 S. Ct. 1531 (2010),* No. 08-1008 *(slip opinion) | Jay Tidmarsh,* Procedure, Substance, and Erie*, Vanderbilt Law Review, Vol. 64, p. 877, 2011.*

37 The rules of procedure have another important parallel to a PACER Fee Exemption request. The Rules Enabling Act of 1934 gave the Supreme Court the ability to create uniform rules of procedure, but they must be sent to Congress before taking effect. Likewise, local courts may adopt local rules, but they may only do so after a period of public comment. In the case of the PACER Fee Exemption, it is simply a "policy note" not a rule, and no public comment has been received. Courts must function in the light of day, but PACER policies have not been subject to this disinfectant. *Sources: U.S. Code,* 28 U.S.C. § 2074 *(Rules of procedure and evidence; submission to Congress; effective date) | U.S. Code,* 28 U.S.C. § 2071 *(Rule-making power generally).*

38 The Blue Team strategy is one of supplication. I will be politely asking the court for a PACER Fee Exemption, arguing that the court has the authority to grant the request, that fees would be a

substantial burden on my ability to conduct this work, and that there are substantial beneficial uses that are precluded if the exemption is not granted.



RED, WHITE & BLUE TEAM WORK

39 The Blue Team work I will do is focused on the Ninth Circuit and the District Courts within the circuit. I will be asking for a PACER Fee Exemption for all documents of a court, my purpose in doing so being to analyze the documents for privacy violations (such as Social Security Numbers) and to report back to the court as to whether or not their privacy policies are effective. I will also notify the litigants and their attorneys of these privacy violations. After redacting any privacy violations, all documents would be uploaded to the RECAP archive.

40 The immediate beneficial use is to monitor the court database for privacy violations and thus help better the operations of the court in question, but I will submit affidavits from prominent researchers, journalists, and other interested citizens that document other beneficial uses of the data that will result from broader public availability.

41 As justification for this proposed task, I will point to my prior audits of the PACER system, as well as the audit I conducted of Court of Appeals decisions that found numerous privacy violations and my work on the IRS Exempt Organizations database. *Sources: Public.Resource.Org,* Audit of Circuit Court Opinions*, May 3, 2008* | Letter from Honorable Lee H. Rosenthal to Carl Malamud*, July 16, 2008* | *Public.Resource.Org,* Audit of IRS Exempt Organizations Returns*, July 7, 2014.*

42 Rather than request a PACER Fee Exemption from a single court, my strategy is to submit five simultaneous applications. Those will go to four District Courts and to the Circuit Court. Needless to say, we will disclose this strategy to the judges, the purpose being to give the judges some discretion as to where they might run this experiment. I have tentatively selected the U.S. District Courts of Idaho, Nevada, Oregon, and the Western District of Washington as well as the Court of Appeals for the Ninth Circuit. The purpose in selecting multiple venues is to make it an issue of concern to the broader Judicial Council of the Ninth Circuit, the executive body which works with the Chief Judge to provide "necessary and appropriate orders for the effective and expeditious administration of justice." *Source: U.S. Code,* 28 U.S.C. § 332 *(Judicial councils of circuits).*

43 It is my contention that making one full district available on RECAP for a period of time (I will propose a two-year experiment) falls well within the purview of the courts to conduct local experiments. I will argue that the court not only has the authority to grant my request, but that it is in the best interests of the Ninth Circuit to conduct at least one such experiment. The Long Range Plan for Information Technology in the Federal Judiciary, Fiscal Year 2014 Update (*op cit* at ¶ 5), states "the innovations of individual courts are essential to the success of the Judiciary's IT program." It is a long-held principle that each court has considerable discretion in framing local rules and orders, subject of course to the requirements of Judicial Conference policy and the requirements of the Enabling Act, which allowed the uniform rules of procedure. As Senator Thomas Walsh of Montana said during the debates over the enabling act, "it is beyond human ingenuity or talent to frame statutes or rules suited to every contingency." *Source: Stephen Subrin,* Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, University of Pennsylvania Law Review, Vol. 137, No. 6, pp. 1999-2051, June 1989.*

44 In order to prepare and present these requests, file them, and to argue before the court, I have applied to two prominent law firms for pro bono representation.

45 This strategy of polite supplication will result, hopefully in at least an opportunity to present the beneficial uses to the court and to get the Administrative Office to formally explain any objections they might have to such a scheme.

46 When we speak of the Red Team approach to litigation, we draw inspiration from the early litigation strategies put in place by the NAACP. Starting with an initial strategy memo by Nathan Margold, then elaborated by the intense work of Charles Huston and then Thurgood Marshall, they embarked on a program of

THURGOOD MARSHALL

litigation in multiple venues and with multiple types of cases, with an aim to "work out model procedures through actual tests in court which can be used by local communities in similar cases." Multiple cases in multiple venues not only test the waters for different legal theories, they help inform communities of the rights they are being denied. *Sources: Genna Rae McNeil,* Groundwork: Charles Hamilton Houston and the Struggle for Civil Rights*, University of Pennsylvania Press, 1983, p. 116. | Mark V. Tushnet,* The NAACP's Legal Strategy against Segregated Education, 1925-1950*, University of North Carolina Press, 1987.*

47 When we speak of the Blue Team approach to supplication, we draw inspiration from Gandhi, a firm believer in petitioning the government with careful and specific demands. In Hind Swaraj, Gandhi drew on the words of Justice Ranade, one of the founders of the Indian National Congress. Gandhi said: "Justice Ranade used to say that petitions served a useful purpose because they were a means of educating people. They give the latter an idea of their condition, and warn the rulers … a petition of an equal is a sign of courtesy; a petition from a slave is a symbol of his slavery." *Source: M. K. Gandhi,* Indian Home Rule*, 1910, p. 70.*

48 When we speak of the Red Team and Blue Team approaches, it is important that we do this Internet-style. While I will be petitioning the court, that does not preclude anybody else from mounting their own efforts, particularly in other circuits or by proposing other beneficial uses than the ones I proposed. When Dave Clark said "We reject: kings, presidents, and voting. We believe in: rough consensus and running code," two important points should be kept in mind. Rough consensus and running code means there should be lots of parallel efforts, perhaps even efforts that look duplicative or competitive. When he said we reject kings and presidents he meant we do not take kindly to one individual who wishes to control and direct. Decentralized efforts where everybody did what they thought best is how the Internet was built. *Source: Andrew L. Russell,* 'Rough Consensus and Running Code' and the Internet-OSI Standards War*, IEEE Annals of the History of Computing, 2006.*

49 We turn now to the final approach, that of agitation, an approach I will term the White Team approach. While substantial resources are needed for litigation and supplication, with agitation anybody can participate with little effort. The purpose of this approach is to make our presence known and let all the judges (and their oversight bodies) know that there really is a problem with PACER.

MAY DAY IN CENTRAL PARK, NYC / 1907

50 It is interesting to trace the origin of the celebration of May 1. Originally a celebration of spring and a pagan holiday, May Day was adopted and morphed into a celebration of International Workers' Day and a celebration of communism. Then, in the McCarthy Era, conservative lawmakers coopted the holiday once again and called it "Law Day." *Sources: Wikipedia,* May Day*, last modified January 1, 2015 | Eric Chase,* The Brief Origins of May Day*, Industrial Workers of the World, 1993 | Dwight D. Eisenhower,* Proclamation 3221: Law Day*, May 1, 1958.*

51 This year, the American Bar Association has embraced Law Day with a vengeance, using it as an occasion to mark the 800th anniversary of Magna Carta. Magna Carta, of course, helped embed the proposition that our courts must function in the light of day into the common law of England, the United States, and many other countries. Freeing PACER fits very well into those themes, so perhaps we could invite ourselves to join in on their day of celebration. *Sources: American Bar Association, Law Day 2015,* Magna Carta: Symbol of Freedom Under Law / *United Kingdom, Magna Carta,* 1297 c. 9 *(Regnal. 25 Edw 1).*

ROBINSON'S MAGNA CHARTA

52 The three activities that I propose all build up to Law Day, a National Day of PACER Protest. First is the idea of cards and letters. Send a personal note to the Chief Judge of the District in which you are located. *"Dear Your Honor, I loved your opinion*

in Foo v. Bar, I'm a law student, I hope you'll do something about PACER." Most judges have no idea how much those of us on the outside abhor PACER. If a judge gets 50 cards, that judge is going to take notice and might even look into the subject. You can mail your card, but you can also just drop it off at the clerk's window. If 50 polite law students and citizens all file up to the clerk's window on May 1, you can bet that clerk will remember that Law Day.

53 The second strategy is to use the PACER waiver of any fees that are under $15/quarter. On May 1, what if a lot of people all downloaded $15/worth of documents and perhaps even set a record day for amount of PACER usage?

54 Using your $15/quarter in "free" is an easy activity. You need to get a PACER account, then you need to get the RECAP extension for either Firefox or Chrome. Do this in the first quarter so you can casually and at your leisure make sure your setup is working. That way you know you'll be set to go on May Day. *Sources: RECAP The Law,* Firefox and Chrome Extensions / *PACER Service Center,* Registration Wizard.

55 My hope is that groups will gather together and focus on a single district or circuit court. Law schools are a natural, it wouldn't be hard to get a couple hundred law students at a school to all go after their local district. But, this doesn't have to be limited to lawyers! For example, there's a wonderful group called DC Legal Hackers which was started by Alan deLevie, Rebecca Wiliams, Jameson Dempsey, and other talented public-spirited people in Washington. Likewise, Chicago has an extremely active civic community and active groups such as the

Smart Chicago Collaborative, founded by Daniel X. O'Neil. My hope is that some of these groups might get involved as well! (This memo is the first they will have heard of this, so I don't presume to task them with work, but only hope they will consider participation.)

56 In order to support the concepts of groups working together, I have made a small grant to the Free Law Project to add a simple "group name" field to your RECAP Extension preferences. They will furnish me a report on May Day showing each file and group name, so I can tally a total by district. In addition to taking over RECAP from Princeton, the Free Law Project is also responsible for the wonderful Court Listener System, which has millions of opinions covering 358 appellate and supreme state and federal courts, as well as unfettered bulk access, an API, and many other features. Brian Carver and Michael Lissner have made a huge commitment to the Free Law Project and if you can help support their work, you would be helping out a very worthy new non-profit struggling to get started.

57 In order to stimulate a little friendly competition, we will monitor the RECAP logs on May 1 and for the group that uploads the most data for a single court we will award the Aaron Swartz Memorial PACER Cup, a handsome artifact suitable for display in your law school or civic venue trophy case. The next year, if PACER is still behind a paywall, we will rerun the competition and the new winner will get the cup. If and when the PACER paywall gets dropped, the last one holding the cup gets to keep it. We have commissioned Point.B Studio, who worked very closely with Aaron on projects for a decade, to design and implement the PACER Cup.

58 A note of caution is in order. While we certainly want to encourage people to use as many $15 chunks of PACER as possible, and that this is certainly a hack in the traditional sense of the term, this is not an invitation to do anything untoward. It is imperative that we behave politely and ethically lest all these efforts come to naught because somebody decided to throw digital rocks at the pay wall. We want the Chief Justice and the Congress to "tear down this wall" of their own accord because they see "the new is knocking on every door and window." *Sources: Ronald Reagan,* Remarks on East-West Relations at the Brandenburg Gate in West Berlin*, June 12, 1987 | U.S. Diplomacy Center,* Response of Mikhail Gorbachev*, Voices of U.S. Diplomacy.*

59 While we can petition the courts, ultimately the easiest solution would be to get Congress to simply declare that PACER needs to be free. So, the third activity is to write to House and Senate Judiciary Committees and ask them to hold hearings on PACER, something they haven't done in years! In the Senate, you'd write to Senator Grassley and Senator Leahy. In the House, you'd write to Congressman Goodlatte and Congressman Issa (who chairs the Courts subcommittee this year!), and on the minority side to Congressman Conyers and Congresswoman Lofgren. Tell them you want to see hearings and that it will be a great show. Congress loves good theater.

60 In summary, there are three easy things you can do to agitate: send a letter to a judge, use your $15 of free PACER per quarter, and write to the Congress. Once again, this is an Internet-style campaign so feel free to propose (and implement!) your own

strategies. If you prefer petitions to letters, go for it. If instead of hacking the $15 quarterly fee waiver, you want to raise money and buy documents, go for it.

61 This three-part strategy is based on a deep faith in the good will of judges. Every judge I have gone to see has been polite and friendly. When I explain why I don't like PACER, or my travails with edicts of government or the IRS, they listen and ask intelligent questions. I believe if we bring the subject of PACER up to every Chief Judge in the federal judiciary and explain what the PACER problems are, they will see the light and remove those unsightly tollbooths they have placed on the road that gives us access to our system of justice. I truly believe senior policy makers just don't get how bad PACER is and once they hear from us, change will come.

Q01: What is the PACER System?

A01: PACER—pacer.psc.uscourts.gov—is a system maintained by the U.S. Government for the publication of federal court documents, such as opinions, briefs, orders, and forms. According to the PACER FAQ:

> "Public Access to Court Electronic Records (PACER) is an electronic public access service that allows users to obtain case and docket information from Federal Appellate, District and Bankruptcy courts, and the U.S. Party/Case Index via the Internet."

Q02: Is your site —pacer.resource.org— affiliated in any way with the PACER System?

A02: No. We are not affiliated in any way with the official **PACER System**. This system is run by public.resource.org, an independent 501(c)(3) nonprofit. We are working with our colleagues at Creative Commons to create the Legal Commons.

Q03: Why do the PACER People charge $0.08/page?

A03: Fees for access to PACER are governed by the Judicial Conference's Electronic Public Access Fee Schedule, which mandates recovery of costs. PACER is a classic old-fashioned "big iron" project with tons of big computers and loads of contractors. You've read about these systems in the papers for years: the FBI database fiasco, the IRS systems-update fiasco, or the FAA's "whoops, we forgot to talk to the users" $500-million cost overrun.

The **PACER System** comes out of the same school of thought as these other failed systems.

The **PACER System** is such a soup-to-nuts, NIH-style big, big, big project that the fee schedule even includes a line item for $0.60/minute if you dial in to the judiciary's private Internet using a "modem" (a device you attach to a "telephone" to access direct-dial systems such as your Compuserve or Prodigy account).

Q04: What do the PACER People do with all the money they collect for the PACER System?

A04: The money is put in the Judiciary Information Technology Fund as mandated by Title 28, Chapter 41, § 612 of the U.S. Code. The courts are required to report to Congress on the status of that fund, but neither the Congress nor the courts regularly publish that material.

There are some things that are not covered in this fund and are kept off the books, as it were. For example, while the **PACER System** covers current materials, the courts don't have copies of their own archives in a digital format, so the judges and their clerks pay significant sums to commercial vendors such as WestLaw and LexisNexis to access their own decisions.

Q05: Is there any *free* access to the PACER System?

A05: Yes, a pilot project has been recently started in 16 law libraries, strategically located around the country. The project is being administered by the Government Printing Office, which is, among other things, assessing whether or not this Internet phenomenon is here to stay:

"The project, which will last up to two years, is part of the judiciary's continuing effort to expand public access to court records by discovering if a segment of the public desires access to information contained in the PACER System but is unlikely to go to a courthouse or become a PACER User."

Q06: Seriously? So, with 16 locations for the entire United States, doesn't that work out to approximately one location every 221,090 square miles? If I can't get to my "neighborhood" location, is there a more convenient alternative to obtain these public documents?

A06: You may petition individual judges, who are permitted to grant fee waivers on a case-by-case basis. However, judges' hands are tied by the official guidance contained in the fee schedule:

"Courts should not exempt local, state or federal government agencies, members of the media, attorneys or others not members of one of the groups listed above. Exemptions should be granted as the exception, not the rule. A court may not use this exemption language to exempt all users. An exemption applies only to access related to the case or purpose for which it was given. The prohibition on transfer of information received without fee is not intended to bar a quote or reference to information received as a result of a fee exemption in a scholarly or other similar work."

Q07: Does *"prohibition on transfer of information received"* mean court decisions are confidential or proprietary? Can they do that?

A07: This is a bit of judicial FUD intended to preserve a revenue stream. If you apply for the fee waiver as the source of your documents, you are forced to give up your rights and renounce the public domain. This is a trick the **PACER People** learned from their commercial cousins, using contracts as a way of building a wall around public domain materials in a bid to "extract rents," as the economists say.

But, everybody in the judiciary freely agrees that these documents are Works of the United States Government and are in the Public Domain. So, if you pay your $0.08 per page for a PACER document, you are free to do whatever you want with it.

Q08: This money these **PACER People** collect, is it a lot?

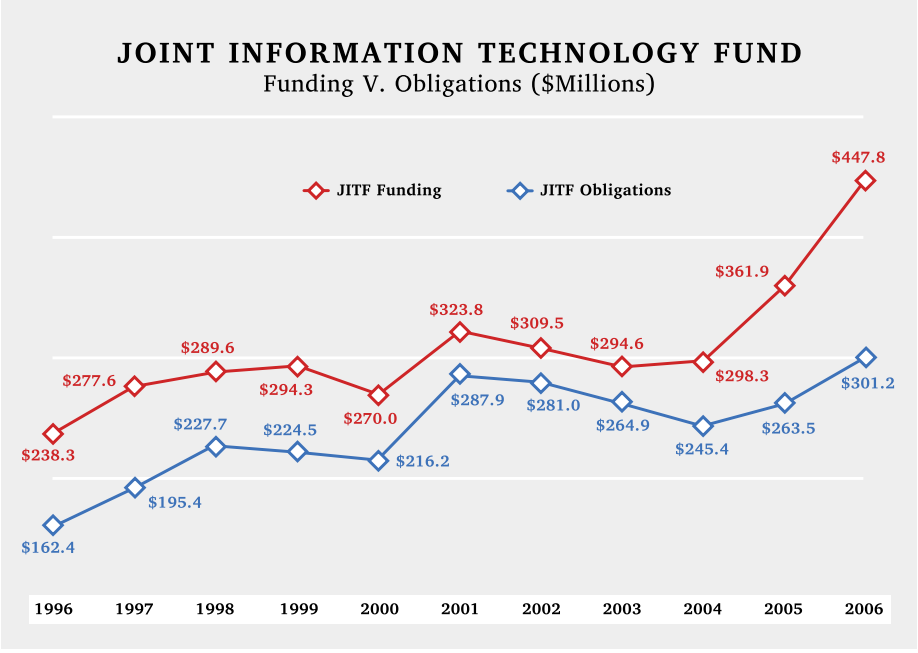
A08: The judiciary is kind of opaque on this subject, but in the Report of the Proceedings of the Judicial Conference of the United States on March 13, 2007, the Committee on Information Technology could be seen blushing throughout its report:

> "The Committee on Information Technology reported that it reviewed the Judiciary Information Technology Fund Annual Report, which describes sources of funds, obligations, and unobligated balances. The Committee focused on the significant accumulation of unobligated balances, which in large measure reflects the cumulative results of cost-containment initiatives and the success of the CM/ECF system in the district and

bankruptcy courts. It adopted a multi-part strategy to reduce future unobligated balances, including expanding the use of Electronic Public Access funds."

Q09: So, is it fair to presume that *"significant accumulation of unobligated balances"* means a lot of money?

A09: Yes. They're rolling in dough. Even after paying for all that big iron and the hordes of contractors, they still can't figure out how to spend their money. Indeed, if you call the Administrative Office of the Courts and ask them politely, they'll send you a copy of the Joint Information Technology Fund Annual Report that they are mandated to send to Congress. This report contains an interesting graph:



In 2006, the fund received $447.8 million, but they could only figure out what to do with $301.2 million, the so-called "obligated balance." In other words, they had a "significant unobligated balance" of $146.6 million. At 8 cents per page for a **PACER Document**, they could give away 1.8 **billion** pages of documents to the public and still have all the money they need to pay for their computers.

Q10: Why are you offering a way of recycling PACER Documents?

A10: We think that the "segment of the public" that ought to have access to the law of the land is "everybody." Making people register and pay $0.08/page is a huge obstacle to access, and the alternatives of petitioning a judge or going to one of 16 specialized libraries in obscure locations are certainly not adequate public access safety valves.

The law contains the rules that govern our society. We just want to be able to read our own user manual.

Q11: Won't this recycling scheme cost the PACER People money?

A11: Maybe, but we don't think so. Big law firms and other conservative users are the only folks who can afford the system now, and they're notoriously cost-insensitive and slow to change.

But, even if this does cost the **PACER People** money, that is no reason not to make the law available to the public. The courts have always been "unanimously of opinion that no reporter has or can have any copyright in the written opinions." Wheaton v. Peters, *33 U.S. (8 Pet.) 591, 668 (1834)*

Q12: How does recycling work?

A12: Just upload all your **PACER Documents** to our recycling bin. Click on the recycle bin and you'll be presented with a dialogue to choose files to upload. Then, just hit the "Start Upload" button and you'll hear the sounds of progress as your documents get reinjected into the public domain.

We'll take the documents, look at them, and then put them onto bulk.resource.org/courts.gov/pacer for future distribution. This is a manual process and you won't see your documents show up right away. But, over time, we hope to accumulate a significant database of **PACER Documents**.

Q13: What is the Thumb Drive Corps?

A13: Most recyclers will use the Internet interface to drop a few documents into the recycling bin at the close of a workday.

A few people, however, are signing up to make a more substantial contribution to our public domain by uploading large numbers of documents. One way these committed citizens are accomplishing this task is going into one of the 16 designated free access facilities with a USB-based portable thumb drive, filling it up with free **PACER Documents**, and uploading them here for recycling.

Q14: Is this legal?

A14: You betcha! These are public documents.

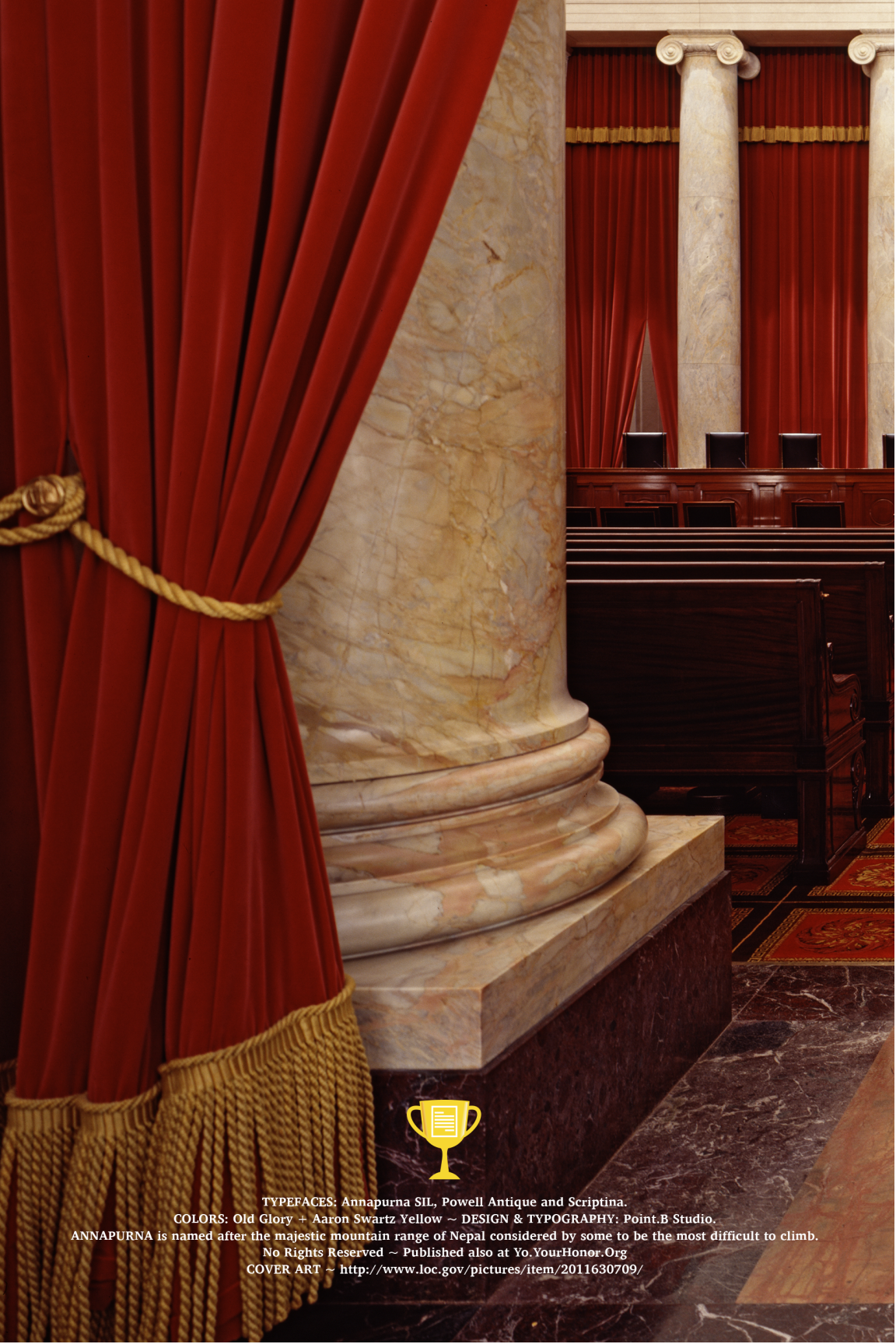
Q15: What are "digital offsets" and why will they help save the judiciary?

A15: Recycling may be the right thing to do, but it isn't always convenient to your lifestyle at the present moment. With digital offsets, you can make a tax-deductible donation to Public.Resource.Org which we will use to buy an equivalent amount of **PACER Documents** on your behalf. Go Purple and become a net-neutral contributor to the public domain!

Q16: Besides recycling **PACER Documents**, are you doing anything else to make federal law more accessible?

A16: The **PACER System** contains current documents, but a study of the law requires a historical archive as well. We are working with Creative Commons to release all federal case law on the Internet, and have recently announced a transaction with Fastcase that will result in 1.8 million pages of Courts of Appeals and Supreme Court cases becoming available.

Federal law spans all three branches of government, from congressional hearings and laws to executive branch publications such as the Federal Register and the Presidential Papers. We work with the Internet Archive to make these government documents more broadly available, and we're also actively mirroring current Government Printing Office systems.



TYPEFACES: Annapurna SIL, Powell Antique and Scriptina.
COLORS: Old Glory + Aaron Swartz Yellow ~ DESIGN & TYPOGRAPHY: Point.B Studio.
ANNAPURNA is named after the majestic mountain range of Nepal considered by some to be the most difficult to climb.

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